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IN THE

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OCTOBER TERM, 1988

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982) 7

Allied Tube & Conduit Corp. v. Indian Head, Inc., 108 S. Ct. 1931 (1988) ..... *passim*

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 2, 7

International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) 7

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 7

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 5, 7, 8

NAACP v. Claiborne Hardware Co., 393 So.2d 1290 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982) 7

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The FTC's Memorandum in Opposition[1] persists in viewing this case as if it involved a simple "price-fixing boycott," entirely divorced from any political setting. It thereby misunderstands not only the nature and context of the challenged activity, but also the nature and con-

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[1] The following citation abbreviations are used in this Reply: "FTC Opp." refers to the FTC's Memorandum in Opposition; "C.A. App." refers to the Joint Appendix filed with the United States Court of Appeals for the District of Columbia Circuit; and "Pet. App." refers to the Appendix to the FTC's Petition in No. 88-1198.

text of this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), on which the FTC's Memorandum relies heavily.

Allied Tube involved a private standard-setting organization responsible for publishing "the most influential electrical code in the nation." *Id.* at 1934. Exclusion from that code had numerous consequences common to private standard setting associations:

> [P]rivate certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Id. In addition to these direct competitive effects, many state and local governments routinely adopted the Code into law with little or no change. *Id.* In an effort to exclude competition from polyvinyl electrical conduit, a number of steel producers and manufacturers of steel conduit collectively agreed to pack the upcoming annual meeting of the organization with new members "whose only function would be to vote against the . . . proposal [to allow the use of polyvinyl chloride for electrical conduit]." *Id.* at 1935.

Defendant, one of the steel conduit manufacturers, claimed immunity from antitrust liability under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. It argued that most of the anticompetitive impact came from the adoption of the electrical code into law by a large number of state and local governments, and that the direct anticompetitive effects were therefore incidental to a valid effort to influence government action. *Allied Tube*, 108 S. Ct. at 1938. This Court rejected that argument, observing:

> Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a 'quasi-legislative' body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a 'quasi-legislature' and given the same wide berth accorded legislative lobbying.

Id. at 1939. Although defendant had contended that the legislative impact, without more, rendered conduct political and therefore protected, this Court demurred. Rather, observing that the meeting-packing scheme could "more aptly be characterized as *commercial* activity with a political *impact*," the Court declared that "the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." *Id.* at 1941. (emphasis added). This Court recognized, however, that it was

> admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line.

Id. at 1941 n.10. For this reason, this Court cautioned that "our decision today depends on the context and nature of the activity." *Id.*

In sharp contrast to *Allied Tube*, the CJA lawyers' case is not "close to the line"; rather, the lawyers' conduct was suffused with politics from beginning to end:

- Unlike *Allied Tube*—in which "the activity at issue . . . did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process," *id.* at 1940—the CJA lawyers' "strike" took place in full public view and, in fact, was heavily dependent on, and sought to encourage, publicity to enlist political support

for their views. The lawyers actively sought media coverage—handing out press kits, organizing picket lines, and staging rallies. (Pet. App. 9a.) Several were interviewed on television and radio. (*Id.*)

- Unlike *Allied Tube*, the CJA lawyers' actions not only took place in the open political arena, but were recognized as political petitioning by the D.C. government officials who were the lawyers' putative victims as well as by seasoned observers of the D.C. political scene.[2] The Mayor met with the lawyers prior to the "strike" and made no attempt to dissuade them. Instead "there was a lot of smiling back and forth, and the Mayor said, 'You do what you have to do, and I will do what I have to do.' " (Pet. App. 187a). Indeed, he even took it upon himself to explain how an "emergency" could expedite the normal legislative process under the District's emergency legislative authority. (Pet. App. 187a.) Neither the Mayor, the Chief Judge, nor any member of the D.C. Council appeared at trial to testify that they were the victims of coercion or that the "strike" was not political. In fact, after the legislation passed, several of the Cross-Petitioners were invited to the signing ceremony and the cocktail reception that followed (C.A. App. 193-94, 240, 961), and "several [Superior Court] judges went out of their way to volunteer . . . how pleased they were at [the CJA lawyers'] success." (C.A. App. 184-87.)

- Unlike the conduct in *Allied Tube*, which took place in a private commercial context and had competitive consequences wholly apart from legislative action, the CJA lawyers' conduct was part of a lobbying effort, the *sole* purpose of which was to influence legislation, since the rate of compensation was set by statute and without legislation the lawyers could accomplish nothing.

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[2] Pet. App. 227a; C.A. App. 291-92, 309, 344-45, 347-53, 356-58, 362-67, 395, 414-16.

- Unlike *Allied Tube*, the success of the strike was critically dependent on the lawyers' ability to gain public sympathy—most obviously, because the Superior Court had the power to order any of the 100-odd striking lawyers or approximately 14,000 other active members of the D.C. Bar in private practice to take appointments.[3]

- The "strike" was designed to focus public attention on an issue of constitutional rights that was already the subject of serious public concern by those with no economic stake in the decision. (*See* Pet. App. 225a, 227a; C.A. App. 322-27 (testimony of Geoffrey C. Hazard)). As the ALJ summed it up:

> city officials (and practically every one else concerned with the criminal justice system) were convinced in 1983 that . . . the optimal economic price was inadequate to satisfy the 'political' (i.e., constitutional) requirement of effective representation. . . .

(Pet. App. 227a.)[4]

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[3] C.A. App. 127-28, 422-24. Indeed, the CJA lawyers were aware beforehand that, as one of them warned, if the court chose to exercise this power, it could break the "strike." (C.A. App. 451-52.)

[4] The FTC apparently believes that whether Cross-Petitioners were seeking to vindicate the constitutional rights of others somehow depends on whether systematic violations of those rights were proved before the FTC or the courts. *See* FTC Opp. at 2 n.2, 6-7 & n.7. But antitrust liability cannot turn on such proof. This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), imposed no requirement that systematic violations of the constitutional rights of blacks in Claiborne County, Mississippi, be proved in court as a prerequisite to political action. Moreover, the FTC's position seems to envision a vastly diminished role for the legislature in protecting constitutional rights—a world in which constitutional rights could be vindicated *only* in the courts. As the ALJ found, "every expert who had studied the problem had concluded that the pre-boycott rates . . . were woefully inadequate" to secure effective representation (Pet. App. 225a, 227a; *see also* Pet. App. 170a-178a). Such experts included the Judicial Conference of the United

- While the lawyers generally stood to gain economically from a higher rate of compensation, a major motive (and in the case of at least the individual Cross-Petitioners, the predominant motive) was to bring more and better lawyers into CJA work so as to improve the quality of CJA representation generally.[5] Indeed, Cross-Petitioner Slaight had at the time already formed an intention to leave CJA practice and had stopped taking new appointments. She participated as a leader of the "strike" because she believed "it was the right thing to do" and "felt [she] was doing more for [her] clients by supporting the increase in legislation than [she] had done for the last two and a half years [representing clients under the CJA]." [6]

States, which wrote that a failure to increase the then identical federal CJA rates "may significantly erode the quality of legal services which the Sixth Amendment . . . mandates." (C.A. App. 672.) These facts are hardly diminished by a concession by Cross-Petitioners that systematic violations were not proved; the political context of the "strike" is sufficiently established by the fact that the CJA lawyers, all the experts, and governmental officials so believed.

[5] *See* C.A. App. 156-61, 235-40, 263-67, 450, 474-77, 480-81, 497-98, 504-05. As the ALJ found:

> [W]hile CJA practice initially attracted able young attorneys, the low rates eventually drove experienced and capable CJA attorneys into more lucrative fields. This loss of attorneys with two or three years experience was described by Professor Hazard [in his testimony for Cross-Petitioners at trial] . . . as the most pernicious effect of a low rate.

(Pet. App. 176a.)

[6] C.A. App. 265-67. She subsequently decided to and did return to CJA practice after a stint at a public interest organization in New York. Two of the other three individual Cross-Petitioners, Ms. Koskoff and Mr. Perrotta, whose involvement in CJA work had been of relatively recent vintage and had grown out of long histories of public interest, political, and/or organizing work (*see* Pet. App. 148a-149a), left CJA practice shortly after the events in question, reflecting the often rapid turnover among those regularly taking CJA cases (particularly among the younger lawyers).

> Other CJA lawyers felt that higher rates would be economically detrimental to them because so many new lawyers would be drawn to taking CJA cases that it would make it difficult for lawyers that wished to make a living at CJA work to get enough cases to do so. (C.A. App. 498.)

Whether or not any single factor alone is sufficient to classify conduct as exempt from antitrust liability under the *Noerr* doctrine,[7] *Allied Tube* counsels us to consider the *entire* context and nature of the challenged activity.[8] Through this lens, the CJA lawyers' conduct was clearly a "publicity campaign directed at the general public, seeking legislation." *Allied Tube*, 108 S. Ct. at 1936, citing *Noerr*, 365 U.S. at 140-41. Such conduct

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[7] *Cf. Allied Tube*, 108 S. Ct. at 1941 n.11 ("[*A*]*t least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability" (first emphasis added)).

We emphasize that it is *antitrust* liability that is being discussed. The FTC cites *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), for its holding with respect to conduct falling within the core purpose of a Congressional enactment specifically aimed at secondary labor boycotts, without mentioning that on the same facts the application of the *antitrust* laws was *rejected*. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982).

[8] *See supra* note 7. *See also Allied Tube*, 108 S. Ct. at 1939-42 & n.10. Conversely, the FTC's attempt to make dispositive the mere fact that *Claiborne Hardware* largely involved consumers, while the CJA lawyers are suppliers, makes no sense for antitrust purposes. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (price-fixing by buyers held to be *per se* unlawful). Were it appropriate to decide cases on such a single factor taken in isolation, then presumably *Claiborne Hardware* would have turned on the fact that the boycotters opened a retail store in competition with the white merchants. *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1296 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982). Obviously, this Court did not so hold.

"enjoys antitrust immunity even when the campaign employs unethical and deceptive methods." *Id.* at 1937. In its heavily political orientation, the CJA lawyers' "strike" resembles the conduct of the boycotters in *Claiborne Hardware*, and should be treated accordingly.

Respectfully submitted,

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